



OFFICE OF THE POLICE COMMISSIONER

ONE POLICE PLAZA • ROOM 1400

November 15, 2011

Memorandum for: First Deputy Commissioner
Attention: Chief of Personnel

**Subject: ADMINISTRATIVE TRANSFER OF A UNIFORMED MEMBER
OF THE SERVICE**

1. **P.O. Gregory Durand, Tax # 900301**, was recently the subject of Disciplinary Case No. 86030/10.

2. Separate and apart from the disciplinary process, the Police Commissioner directs that P.O. Durand be transferred to a PSB Precinct enforcement command located **within** the confines of Patrol Borough Queens South, subject to the exigencies of the Department.

3. Further, P.O. Durand will not be the subject of any future transfer without the explicit approval of the Police Commissioner.

4. Forwarded for necessary attention.

BY DIRECTION OF THE POLICE COMMISSIONER

Michael E. Shea
Assistant Chief
Commanding Officer
Police Commissioner's Office

APPROVED

NOV 15 2011
RAYMOND W. KELLY
POLICE COMMISSIONER



POLICE DEPARTMENT

September 15, 2011

MEMORANDUM FOR: Police Officer Gregory Durand
Tax Registry No. 900301
Fleet Services Division
Disciplinary Case No. 86030/10

The above-named member of the Department appeared before Assistant Deputy Commissioner Grappone on June 16, 2011, and August 11, 2011, and before me on September 6, 2011, charged with the following:

1. Said Police Officer Gregory Durand, while assigned to PSA #9, while on-duty, at about 0120 hours on August 11, 2008, at New York Hospital Queens, Queens County, was discourteous to Ernette Barnes, to wit: After Ms. Barnes' son was allegedly sexually assaulted, and Respondent was investigating said sexual assault, Respondent made a discourteous comment to Ms. Barnes that minimized the seriousness of the allegation.

P.G. 203-09 – PUBLIC CONTACT

The Department was represented by Nancy Lichtenstein, Esq., Department Advocate's Office, and Respondent was represented by Michael Martinez, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Not Guilty

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Ernette Barnes and Matthew Wasserman as witnesses

Ernette Barnes

Barnes, a resident of [REDACTED], is the mother of three children. She does not drink alcohol and was not drinking on August 10 and 11, 2008. She takes "about [REDACTED]" medications a day for [REDACTED] and [REDACTED]. On August 10, 2008, she took medication at four o'clock in the morning. The medications that she takes do not make her drowsy or make her speech slurred at all.

On August 11, 2008, at about 1 a.m., Barnes received a call from her mother telling her to come over. Upon arriving at her mother's building a block away, Barnes saw emergency medical technicians (EMTs) attending to her then-18-year-old son, [REDACTED], who was on the floor inside her mother's building beneath the mailboxes and wet with his own vomit and blood. At the time, [REDACTED] lived with Barnes' parents and cared for Barnes' mother, who was cancer-stricken.

[REDACTED] tried to tell her what happened but kept on going in and out of consciousness. Barnes later found out from her son that he had gone to the home of [REDACTED] to get a phone cord and was served liquor.

Also on the scene were two police officers, one who she described as short with black hair and the other one taller with blond hair. She could not identify either of the officers as present in the courtroom with one hundred percent certainty.

Barnes claimed the officers and the EMTs were "giving obscenities" to her son, calling him "a nigger," and saying that he cannot be believed because he was drunk. Barnes claimed that the responders were "not doing anything to help him" and "not even testing to see if he [was] drunk." She said she felt "aggravated" because the police did not help and "did nothing except yell obscenities at [her] son."

Twenty minutes later, [REDACTED] was transported to [REDACTED] Hospital. Barnes did not ride in the ambulance with her son because she was "too busy being put in the hold by one of the officers." She claimed that the black-haired officer held her with her arm bent toward the rear for "a minute or two." She went to the hospital with her father. Once at the hospital, [REDACTED] was placed in the "drunk tank," a room where he was to "sleep it off." She felt he was not getting any help because he was not hooked up to an intravenous bag (IV), so she took him out of that hospital and brought him to [REDACTED] Hospital, where he got the IV, blood work was done and a rape kit was prepared.

Once [REDACTED] was situated, she called the police and a female sergeant arrived, along with the two officers who were at her mother's building. She told the blond officer he could speak to [REDACTED] so long as he was "not going to sit there and yell more obscenities at him." Additionally, she claimed the officer said "[s]omething that means oral sex fellagio, fellegio fellatio, fellagio." She said, "I don't remember the word that he was using but he was saying, '[W]hat's a little fellation.'" She said she could not remember the word that the officer used, "fellatio," when she went to the Civilian

Complaint Review Board (CCRB) but the word meant "oral sex " Barnes claimed the officer said, "Just a little fellatio it's no big deal " This made her "upset" and "aggravated "

Barnes did not file a civil lawsuit regarding this case but she did contact CCRB about a week after the incident Barnes learned from "[REDACTED]'s" aunt, who is like an aunt to Barnes' children, that [REDACTED] got five years on probation for the incident involving [REDACTED]

On cross-examination, Barnes said the name of the person arrested for what he did to her son is [REDACTED]¹ At the time, [REDACTED] was over 20 years old and living with his aunt in Barnes' parents' building

On the date of the incident, after receiving her mother's phone call and going to her mother's building, Barnes found [REDACTED] slouched but upright against a wall on the lobby floor, about six or seven feet from the apartment door where he lived with Barnes' parents He had vomit and blood on his shirt and was surrounded by Barnes' parents and an EMT who "kept calling him nigger" She did not recall seeing the police upon her arrival

She could not tell right away that [REDACTED] had consumed alcohol, and could not smell alcohol on him even when she bent down to him, despite the EMT saying that he was drunk [REDACTED] was going in and out of consciousness and she told them that if [REDACTED] had been drinking, it was not just alcohol To her knowledge, [REDACTED] had never drank alcohol before then She said the EMT, who was black, was "[p]ushing [REDACTED]'s] head

¹ [REDACTED] was referred to as [REDACTED] "cousin" in testimony, however, according to Barnes, [REDACTED]'s aunt is "like an aunt to my children so we're all like family "

against the wall, calling him a nigger trying to yank his chain off his neck He kept saying that he was a nigger and that he was drunk don't believe him, it's not true "

Barnes said she and the EMT were engaged in "a back-and-forth" regarding the veracity of what [REDACTED] was uttering Her son was telling her "bits and pieces" and was fading in and out, recounting that he went upstairs to see [REDACTED] about a cord He had not yet revealed to her what [REDACTED] did At that time, the blond officer, who she named as Respondent, also stated, "[N]o, that didn't happen he's just drunk you can't really put too much in what he's saying "

Barnes did not recall being told to step back or given commands by the police to clear the area while [REDACTED] was being attended to in the building lobby She denied that she was ever told to get away from [REDACTED] when she went over to him, or that the police ever gave her any instructions during the whole time her son was in the building

It was not until [REDACTED] was "dragged" into the ambulance by the EMTs that her parents told her that a crime had been committed against her son, that her son had informed them that [REDACTED] took him and molested him Took him and fellatioed him " She said the officer would not let her ride in the ambulance after she learned what happened to [REDACTED] She tried to go outside, to get on the ambulance, but the black-haired officer prevented her by putting her in an arm hold and reminding her that the EMTs said she could not ride with them She had insisted on going in the ambulance, but the EMT who was calling [REDACTED] "nigger" said no, that her son was "of age " Later on, she said the ambulance had left, unbeknownst to her, before she found out what happened to [REDACTED]

Although she does not have medical training, she asserted that the EMTs "[were] supposed to" give her son an IV

By the time she and her father drove to [REDACTED] Hospital, her son was in the drunk tank sleeping on a stretcher and the officers and the EMTs were no longer there. She told a hospital employee what happened, plus the information that her parents also said he had fallen down five flights of stairs because he was drunk. She was not aware if her parents had told [REDACTED]'s story to anybody before Barnes arrived at the scene. The employee told her that they were only aware that he had been drinking.

Although she did not have a problem with [REDACTED] as a hospital, Barnes took him out of that location and drove him to [REDACTED] Hospital where she told hospital personnel that [REDACTED] had been raped or something to that effect. At this point, she had not gotten the details of what happened from her son.

Barnes agreed that it was fair to say the [REDACTED] performed oral sex on her son, though at the time, she did not know the word "fellatio" and "looked up the word." She agreed that when she spoke to the CCRB investigator, she recounted that the officer stated, "[I]t was a little flatulation some word that they use for oral sex" essentially "a long word with an F." At the time, she could not remember the word that the officer used and told the CCRB investigator that she thought the word meant a certain thing.

The sergeant and the two officers from before showed up at the hospital after Barnes called the police. The blond officer made the "[I]t just a little fellatio" comment in the [REDACTED] Hospital emergency room. She had not had any conversation with him except for his statements in her parents' building that [REDACTED] was drunk, which she agreed was what the EMT was also saying. She agreed that the EMT and the officer kept calling

██████ "nigger" as well. When asked how many times the word "nigger" was used by the officer, Barnes stated, "Maybe once. He used it once. The EMT used it twice."

Afterwards, she started to tune him out. When asked how many times she thought the officer and the EMT used the word "nigger" to describe or call her son, she answered, "Probably more than four, give or take."

Barnes denied that her demeanor while at her parents' building was frantic. She said she was trying not to panic because she did not know what was going on. She denied that she was yelling and said, "I was calm." She said she was also calm when she got to ██████████ Hospital. She did not yell at anybody and say that they were not doing anything right. She denied that she told anyone to put ████████ on an IV. She denied that she told anyone at that hospital what happened to ████████, and said that "I knew I was taking him out of there. I was waiting with the intent of taking him out of there." She

not happy with the treatment ████████ was receiving at ██████████ Hospital, he was not staying there anyway.

Upon arriving at ██████████ Hospital with ████████ Barnes claimed she was calm there as well, despite her belief at the time that an older person had made her son intoxicated and performed oral sex on him, and then her son had fallen down five flights of stairs. She explained to the sergeant what happened and told her that she did not want to deal with those particular officers, if possible, because of the way they treated her son. She said the blond officer said to her, in front of the sergeant, "Oh, you thought you was to deal with us, but we got news for you, you're going to deal with us."

She said the black-haired officer "never said anything," even when he placed her in the hold

Barnes said that she asked the blond officer for his shield number but he did not want to give it to her. She was able to obtain his shield number because he had to write his shield number because of the rape kit. She said she was able to see his name on his nameplate and his name was Respondent's. The black-haired officer did not have a problem giving her his shield number.

When asked, "[W]here were you when the statement came out about what you originally said is 'it was a little flatulation' which you later amended to 'a little fellatio'?" Barnes said it was said at the nurses' desk in [REDACTED] Hospital. At the time, [REDACTED] was on a stretcher inside a room about five or six feet away. The officer's back was to her when she heard him make this statement. When asked, "You didn't remember what term he used, correct?" Barnes answered, "Yeah, fellatio, flatulation." She did not know the term and went home to look it up. A doctor also explained the term to her. At the time, she knew that [REDACTED] was accused of performing oral sex and not anal rape because [REDACTED] had made that clear to her as she and her father were transporting him.

Barnes agreed that whatever term the blond officer used, she did not understand what he was saying but she knew what he meant, and to her, he was downplaying the fact that it was oral sex. At that point, she had been using the phrase that her son had been raped, and that is what she told the hospital staff. She agreed that the blond officer turned away from her when she heard him make that statement and she did not know what the word was but knew it started with an F and it had to do with oral sex.

"[B]etween a week to a month, give or take" after the incident, she went to the [REDACTED] Her arm was hurting and she wanted to make sure she did not reinjure her shoulder. She was told that it was not a problem.

When she met with the CCRB investigator, [REDACTED] went with her. She signed a [REDACTED] who put her in the arm hold and CCRB asked for her records to see if she suffered any injury as a result of that. Her son was also asked to sign a release for his medical records. Barnes denied that she told him not to sign it. She said she told him he was free to do what he wanted to do, and he did not sign it. She denied that she had anything to do with his decision and denied the CCRB investigator's conclusion that she did not allow [REDACTED] to sign the release.

Barnes said [REDACTED] met with a district attorney in relation to his case but did not appear in court for the case against [REDACTED]. "No one informed" her about how the case ended, but she was told by her son that [REDACTED] got five years probation.

On redirect examination, Barnes said that after the ambulance with [REDACTED] departed from her parents' building, the police officers were outside. She did not see them conducting an investigation or interviewing anyone.

On further cross-examination, Barnes agreed that the only information she got from her son while in her parents' building was "something about [REDACTED] he gave him something to drink, and a cord." She did not know when [REDACTED] had told the story to her parents and nor if [REDACTED] had told the events to the EMTs and the officers yet.

Wasserman is a CCRB investigator who has worked for CCRB since December 2008. He was the CCRB investigator assigned the instant case and he took a tape-recorded phone statement from a witness named [REDACTED], a doctor at [REDACTED] Hospital. Wasserman had attempted to get an in-person interview from [REDACTED] by going through the [REDACTED] Hospital legal department but they were not willing to cooperate because the victim did not sign a HIPAA² form [Department's Exhibits (DX) 1 and 1A, tape recording and transcript of Wasserman's contact with [REDACTED] and the [REDACTED] Hospital legal department]

On cross-examination, Wasserman agreed that trying to interview a doctor "is a little bit more difficult" than interviewing complainants. He concurred that the first 14 pages of the transcript (DX 1A) document his efforts to get access to [REDACTED] to interview him. It is not until page 15 that his contact with [REDACTED] begins to be documented. Wasserman was refraining from making an appointment for an in-person interview with [REDACTED] depending on what the doctor told him on the phone. He agreed that it is always better to interview people in person so that he can assess the person's demeanor and body language, ensure that he is not being coached and verify his identity.

Wasserman agreed that he wanted to speak to [REDACTED] in person, but that never materialized. He said that [REDACTED] was amenable to a further interview, but the [REDACTED] Hospital legal department was the one who "gave [him] a problem." Wasserman agreed that the [REDACTED]'s interview ended abruptly on the phone, though he claimed that there was "slightly more but it wasn't preserved on the tape. [He] remember[ed] actually setting up an appointment with him [REDACTED]." Wasserman agreed that the interview

² Health Insurance Portability and Accountability Act. Patients must consent to the disclosure of their health information.

ended abruptly and in the middle of the interview, but he insisted that he finished up the interview and arranged to see [REDACTED] although this is not recorded on the tape or in the transcript. Wasserman never got to meet with [REDACTED] and the [REDACTED] Hospital supervisor never returned the several calls he made. He was told by a CCRB lawyer that without a HIPAA release, the hospital would refuse an in-person meeting.

Regarding [REDACTED]'s phone statement, Wasserman said the doctor stated that he remembered the incident and the patient after looking up [REDACTED]'s name before returning Wasserman's call. Wasserman did not know what documents the doctor referred to to refresh his recollection and due to the lack of a HIPAA release, Wasserman was unable to request documents.

Wasserman also agreed that when he asked [REDACTED] if he overheard any comments that police officers made to the patient or his mother or anyone involved with the patient, [REDACTED] responded, "[N]ot that I recall." [REDACTED] remembered the patient and even referred to him as "the one who was assaulted by his cousin." [REDACTED] also

with whether or not the sex was consensual and he was aware that there was an issue with whether what occurred was a true assault or a consensual act that was reported as an assault.

Wasserman recalled asking [REDACTED] point blank, "[D]id you ever hear an officer say to Mr. Barnes, it's just a little fellatio, it's no big deal?" The doctor had responded, "[Y]es, he did say that," followed by "I can't say exactly those words," and, "something to that effect." Wasserman concurred that "he [REDACTED] remembered something about fellatio or oral sex or something of that being mentioned."

Wasserman agreed that at that point in the interview, he knew he wanted to conduct a follow-up in-person interview with [REDACTED] because [REDACTED] had recall of the incident. If he had known that the phone interview was going to be the last time he spoke to [REDACTED], he would have asked a lot more detailed questions, such as what exactly he remembered, who it was said to, and where it was said. The doctor asserted that a male officer made the statement, but Wasserman never ascertained that officer's identity.

In addition to the CCRB-substantiated allegation of an insensitive remark in the present case, Wasserman also investigated allegations concerning the use of force and threats of arrest directed at Barnes. Wasserman agreed that [REDACTED] remembered a hostile situation between Barnes and the officers, although the doctor was unaware of what had transpired prior to the officers threatening to arrest Barnes. Wasserman said the officers were exonerated in regard to the allegations of threatening to arrest Barnes because her behavior in the hospital, according to herself, Respondent, and [REDACTED] amounted to the statute of Disorderly Conduct. Wasserman uncovered that Barnes had been "yelling in the hospital waiting room and thus possibly upsetting other patients, doctors, and the functioning of the hospital."

Wasserman said that the officers were also exonerated of the allegation concerning the use of the arm hold. It was deemed " . . . in the circumstances," considering that Barnes was interfering with the EMTs as they were trying to aid her son. He was never able to find out who the EMTs were who responded that night, they worked for a private ambulance company and N [REDACTED] [REDACTED] Hospital was closed when Wasserman conducted his investigation.

Wasserman did not interview [REDACTED], but he did listen to the interviews of [REDACTED] conducted by another CCRB investigator, Nicholas Harmon. He agreed that based on the accounts of [REDACTED] and other people involved, Barnes was interfering with the EMTs and the officers trying to assist [REDACTED] in the building and it was necessary to use force "to keep her at bay."

Barnes, who signed a HIPAA release, claimed that the arm hold applied to her caused a wrist fracture, however, this was not supported by the medical records [Respondent's Exhibit (RX) A]. Wasserman obtained Wasserman concurred that Barnes' medical records showed that she had a degenerative bone condition, that she went to the hospital for treatment 18 days after the arm hold but stated that the pain had started three days before the arm hold. He said that Harmon's conclusion was that Barnes would not allow [REDACTED] to sign the HIPAA release.

Wasserman determined Barnes' claim that Respondent and the EMT were referring to [REDACTED] as a "big-headed nigger" to be unfounded because it "was completely implausible that an African-American EMT would join in [with Respondent] and say such a thing."

Wasserman agreed that of all the allegations Barnes made against the police, the only allegation that was not unfounded or exonerated was the one at hand concerning the statement, and this was so because he gave a lot of weight to [REDACTED]'s statement.

Wasserman agreed that according to Harmon's interview of [REDACTED], [REDACTED] was 18 years old at the time of the incident and had been drinking with [REDACTED]. [REDACTED] did not assert that he was forced to drink or "was slipped anything." Then, according to [REDACTED], "things happened." Wasserman said there were no real details as to what happened.

between [REDACTED] and [REDACTED] Wasserman did not know the disposition of [REDACTED]'s arrest [REDACTED] in his interview, had fragmentary recollection of what happened to him. He remembered the EMTs asking him if he was gay, but he did not make any allegations against the police officers. He never said that anyone was calling him "nigger," and he corroborated that his mother (Barnes) was acting crazy, was very upset and he wanted her to calm down. Wasserman agreed that CCRB determined that a lot of what Barnes said was not credible.

Respondent's Case

Respondent called Police Officer Michael Cortes as a witness. Respondent testified in his own behalf.

Police Officer Michael Cortes

Cortes, assigned to Police Service Area 9, has been a member of the Department for eight years. On August 11, 2008, at approximately 12:45 a.m., Cortes and Respondent responded to a radio run of a sexual assault at [REDACTED]. They knocked on the door and when the door opened, a "very intox[icated]" [REDACTED] fell out of the door, almost [REDACTED] was not answering and was not coherent. When [REDACTED] tried to speak, his speech was very slurred, he smelled of alcohol and he was falling asleep while the officers were trying to talk to him. The officers moved him to the lobby to await the EMTs.

Cortes said that when Barnes arrived in the building, she was "very irate" and "excited" and "seemed to be intox[icated] herself," because she smelled of alcohol. She physically got in between the officers and her son whenever the officers tried to talk to

him or help him stand up. The officers kept telling Barnes, "[Y]ou need to move. We need to render aid to your son." The EMTs came and were trying to place [REDACTED] on a stretcher and Barnes was interfering by holding onto him and grabbing him.

At that point, Cortes grabbed Barnes, pulled her off of [REDACTED], pushed her away and held her so that the EMTs and Respondent could place [REDACTED] on the ambulance. He said he grabbed Barnes by the wrist and pulled on her arm, placing himself between Barnes and everyone else. In the meantime, Barnes was flailing her arms, trying to pull away, walk around him and push past him. Prior to resorting to the use of force, Cortes had given Barnes commands to back off at least thrice. He said he told her to calm down, but neither he nor Respondent threatened to arrest her if she did not calm down. Additionally, he did not recall anyone making any racially inappropriate comments, such as "big-headed nigger."

Respondent rode in the ambulance with [REDACTED], while Cortes followed in their police car. Upon arrival at [REDACTED] Hospital, Respondent informed him that [REDACTED] had, during the ten-minute ambulance ride, confided that the oral sex performed on him by [REDACTED] was consensual. The officers then finalized the job and resumed patrol.

About four or five hours later, Cortes responded to [REDACTED] Hospital with another partner. Respondent, who was on meal, was not with him. Barnes was in the emergency room, "irate, belligerent and yelling." Barnes would not allow him near [REDACTED] and wanted to speak to a supervisor, so Cortes kept his distance. His sergeant arrived, spoke to Barnes, and told Cortes to go to the scene and arrest the perpetrator. Respondent was not at [REDACTED] Hospital while he (Cortes) was there. Barnes made a

CCRB complaint against him alleging excessive force. It was stipulated that CCRB exonerated Cortes.

Cortes did not hear any conversations between Respondent and doctors at either hospital nor did he hear Respondent say anything to Barnes. He never heard Respondent say words to the effect of, "[I]t's no big deal, it's just a little fellatio," nor did Respondent say anything to minimize what had initially been claimed to have happened to [REDACTED].

On cross examination, Cortes said that when he and Respondent got to the scene of the sexual assault complaint involving [REDACTED], there were no other officers there with them. At the time, he was 5'5" in height, weighed 230 pounds and had brown hair. Cortes did not prepare a complaint report until he got to [REDACTED] Hospital because, earlier, after conferring with Respondent, he learned that what had occurred with [REDACTED] was not a sexual assault but a consensual act. He did not document that [REDACTED] retracted his story, nor did he call the detective squad or the district attorney's office. He eventually prepared a complaint report that [REDACTED] alleged that he was sexually assaulted based on a statement that Barnes gave to his sergeant. When he responded to [REDACTED] Hospital, he [REDACTED]. He did not see Respondent there because Respondent was not there at the same time he was there. He was only at the hospital for about ten minutes because the sergeant told him to go to the perpetrator's address and arrest him, which he did.

Respondent

Respondent has been a member of the Department for over 19 years and is currently assigned to the Fleet Services Division. On August 11, 2008, he was assigned to Police Service Area 9 and working with Cortes when they responded to a radio run of a

sexual assault involving [REDACTED] Upon knocking on the door there, it opened and [REDACTED] fell into the hallway, vomiting on himself [REDACTED] was intoxicated, breathing heavy and "sprawled out on the floor," he was "incoherent and wasn't really answering questions "

Barnes appeared from outside and "[s]he was very irate, screaming, very frantic, kind of noticed like an odor of alcohol perhaps on her breath " She ran over to [REDACTED] and was trying to pick him up off the ground The officers told her to stand back so that [REDACTED] could be attended to When her son was placed on a stretcher, Barnes tried to pull him off and words (which Respondent did not recall) were exchanged between her and the EMTs Respondent said that his responsibility was to ensure the safety of the EMTs while they performed their duties and Barnes interfered with that by "physically trying to pull [REDACTED] off the stretcher she pushed one of the EMTs out of the way " After warning her, Cortes removed Barnes' hand off the stretcher and the officers placed themselves in between the stretcher and Barnes

Respondent rode inside the ambulance to try to ascertain what happened With him was one of the EMTs Barnes was banned from the ambulance During the seven-minute ride to the hospital, [REDACTED] calmed down and recounted that he went to someone's house, they were drinking, and the male at the house performed consensual oral sex on him Prior to departing, Respondent assisted the EMTs with bringing [REDACTED] into M [REDACTED] Hospital and did not see Barnes there

About four hours later, while he was on meal, he was summoned to [REDACTED] Hospital There, Barnes was "very irate and yelling She was upset to see [him] " Respondent tried to explain to her what was going on, that "it's a serious allegation, but it's not rape [He] was trying to give her the technical terms of actually what happened to

her son " He tried to explain what the allegations were and what her son had told him had happened He tried to explain technically what happened to her son and the difference between rape and oral sex Barnes was still angry and he did not think she comprehended what he tried to explain to her He clarified that having had oral sex performed on him is not considered rape, it is oral sodomy

According to Respondent, there were hospital personnel walking around during the less than ten minutes he interacted with Barnes She never said to him that what he said was wrong or offensive No one from the hospital admonished him for anything Respondent denied he ever said, "[I]t's only fellatio," nor did he recall using the word fellatio He denied he ever said, "[I]t's no big deal, it was only oral sex," as he felt that if what was alleged were to happen, "It is a big deal " Barnes "was loud, screaming," at the hospital and Respondent warned her that if she did not calm down, she could be arrested After that, he left the hospital and had nothing else to do with her Respondent later learned that Cortes responded to the hospital as well, but they were not there at the same time

Respondent denied ever calling [REDACTED] a "big-headed nigger," and no one on the scene used those words, including the two black EMTs He never said anything discourteous to Barnes, nor at any point did he try to minimize what had allegedly happened to her son He had the discussion with Barnes because he was trying to explain to her what happened to her son and he was trying to calm her down, but nothing he said to her ever calmed her down

On cross-examination, Respondent said that at the time of the incident, he was 5'11", weighted 170 pounds and was bald Upon his door opening, [REDACTED] was vomiting

and urinating on himself [REDACTED] was not cooperating with any questions being asked of him and kept saying, "help me, help me, help me " Respondent interviewed Barnes en route to [REDACTED] Hospital and did not prepare a complaint report because, based on his investigation, it was a consensual act and no crime was committed It was fair to say that [REDACTED] was intoxicated, in and out of consciousness, and was not in the right state of mind [REDACTED] was transported to the hospital because of his intoxication, not because he had been assaulted

A rape examination was later conducted at [REDACTED] Hospital Respondent did not document the change in [REDACTED]'s story He did not prepare a complaint report, nor did he notify the detective squad or the district attorney's office Respondent did not recall whether he told his supervisor that [REDACTED] recanted his statement. Respondent went to [REDACTED] Hospital alone and had a conversation with Barnes in the emergency room where he "explained to her the difference between rape and what had occurred to her son " He did not recall how far he was standing from Barnes during this talk

On redirect examination, Respondent agreed that, after hearing [REDACTED] recantation in the ambulance, he notified Cortes within minutes of all the information Cortes had not been privy to because he was not in the ambulance Cortes was ultimately the arresting officer in the case

FINDINGS AND ANALYSIS

Respondent is charged in one specification with being discourteous in that he minimized the seriousness of a sexual assault on [REDACTED] the 18-year-old son of the complainant, Barnes Specifically Respondent is alleged to have told Barnes, "Just a little fellatio it's no big deal " Respondent denies making such a statement

On August 11, 2008, at about 12 45 a m , Respondent and Cortes responded to a radio run at an apartment at [REDACTED] There, they found a very intoxicated [REDACTED] There was an allegation that someone had performed a sexual act on [REDACTED] EMTs arrived, as did Barnes

There was testimony from both Cortes and Respondent that Barnes was interfering with the efforts of EMTs to remove [REDACTED] This occurred because she was trying to get close to him while the EMTs were trying to get him on a stretcher This is credible for a number of reasons First, Barnes described herself as being a very protective mother and being very upset Additionally, the officers were exonerated by CCRB with regard to allegations of the use of excessive force This decision was apparently supported at least in part in a statement made by [REDACTED] regarding his mother's conduct at that time

[REDACTED] was removed to [REDACTED] Hospital Respondent accompanied [REDACTED] in the ambulance Barnes was not present at that time According to Respondent, during the ride, [REDACTED] confided that the act was consensual As a result, no complaint report was written at that time

[REDACTED] was later removed, at Barnes' insistence, to [REDACTED] Hospital Some hours after the first encounter, Cortes was told to report to that hospital and was directed by a supervisor to arrest the person who had had the sexual contact with [REDACTED] At about that time, Respondent was also ordered to report to [REDACTED] Hospital, although this was apparently separate and apart from Cortes, who testified that he did not see Respondent at [REDACTED] Hospital It is not known who was there first, Respondent or Cortes, but both said that they were not there together

It was during a conversation between Respondent and Barnes at [REDACTED] Hospital that the alleged offensive statement was made. When asked what Respondent said to her, Barnes testified as follows:

Something that means oral sex and I characterized it as fellagio, fellegio because I couldn't remember the word that he was using. But the word fellation, fellagio -- I don't remember the word the he was using but he was saying, what's a little fellation. And I'm like -- and I was too -- I was done with him because I was really upset. I was really lost there.

Barnes then acknowledged that she could not remember the word "fallacio" when she made her complaint to CCRB. When asked specifically what Respondent said after he said it's just a little "fallacio," Barnes responded:

He's -- just a little fellatio. And the doctor -- he said it in front of the doctor and the doctor was like, I bet you if your nephew, your son had just a little fellatio, you know, I bet you would be upset. You know, and he told me, well, I'm coming back to get you and I'm like, if you got the balls to come back and get me -- excuse me -- I said, if you got them, then you come back and get me. I bet you you don't. Because that's my child and my job is to protect him. I did it for 18 years. And I had to wait till he got to be 18 for something like this to happen. And this is why young men don't report it.

After receiving this non-answer to her question, the Assistant Department Advocate asked: "After you heard the officer say, it's just a little fellatio, did he say it's no big deal or he just said it's just a little fellatio?" After basically putting the words in the witness' mouth, she got the following reply: "Just a little fellatio. Then he's like, it's no big deal. I was upset with him. I was already upset but I really got upset."

The Department also presented hearsay testimony of [REDACTED], the doctor who treated [REDACTED] at [REDACTED] Hospital. A tape and transcript of his statement, given over

the telephone to CCRB investigator Wasserman was placed in evidence. Among the problems with the statement is the same issue, the questioner essentially put the words into the witness' mouth.

Wasserman had made several efforts to reach [REDACTED] and when he finally got him on the phone, [REDACTED] had reviewed material regarding [REDACTED]. We know this because just about the first thing [REDACTED] said was that he remembered the patient and had looked up the name. When asked if he recalled any comments police officers may have made to [REDACTED] or his mother, [REDACTED] replied, "Not that I recall." When asked if he wanted his recollection refreshed, [REDACTED] said, "No I remember. I remember the patient. The guy was assaulted by his cousin." He went on to say the police were concerned as to whether the sexual act was consensual or not.

Not content, Wasserman specifically asked, "Did you ever hear an officer say to Mr. Barnes it's just a little fellatio, it's no big deal?" At that point, [REDACTED] said, "Yes, he did say that," but he quickly added that he could not say exactly those words were used. When prompted again by Wasserman, he agreed it was "something to that effect." However, he then indicated that the context was about a suspicion the officers had that the sexual encounter had been consensual.

It should be noted that this telephone conversation was somehow disconnected or cut off. [REDACTED] an in-person interview with [REDACTED] but that did not occur nor did [REDACTED] testify at this trial. Apparently, this was because the hospital did not receive a HIPAA release for such testimony. Such a release, of course, was in the control of Barnes and/or [REDACTED].³

³ There was a representation made to the Court that a release was ultimately obtained but that [REDACTED] declined to comply with a Department subpoena to appear.

Given the manner in which the questioning was conducted, further questioning of [REDACTED] would be necessary before [REDACTED]'s statement could be accepted as truly probative evidence. One obvious point of examination would relate to [REDACTED]'s statement that he could not say that those were the actual words used.

Moreover, [REDACTED] stated that whatever the officer said was in the context of a concern the officer had that the sexual encounter was, in fact, consensual. The quoted statement Wasserman suggested to [REDACTED] is not one of concern but of derision. Under those circumstances, [REDACTED] may have mis-remembered what was said or simply agreed to the language presented to him by Wasserman.

While police officers have an obvious responsibility to arrest the perpetrators of crime, they also have a responsibility to avoid arresting people who have not committed crimes. Respondent testified that [REDACTED] had told him in the ambulance that the encounter was consensual so there was certainly a basis for concern as to whether a crime had actually been committed.⁴ As M [REDACTED] put it, that was officers' "dilemma."

[REDACTED]'s statement also sheds some light on the hostile relationship between Barnes and the officers. He stated that Barnes started screaming at the police and they threatened to arrest her. This surprised him but he admitted he did not know what they were talking about.⁵

There is no question that Barnes was angry at Respondent. Evidence at this trial, including the CCRB referral, makes clear that Barnes filed numerous complaints against

⁴ In his testimony about the statement made by [REDACTED] to the prior investigator, Wasserman noted that while the issue of the sexual encounter was not fully explored, [REDACTED] indicated that his intoxicated state was voluntary. With regard to the sexual encounter, he testified that [REDACTED] stated that "things just happened." This would tend to indicate that "forcible compulsion," needed to establish a criminal sexual act under the penal law, was not a factor.

⁵ Wasserman testified that he had uncovered evidence that Barnes had been disruptive in the hospital and that she might have been subject to arrest for Disorderly Conduct. Consequently, the officers were exonerated in regard to Barnes' complaint that she had been subject to the threat of arrest.

Respondent and other officers All of those allegations, except the one at issue in this case, were unfounded or exonerated according to Wasserman

██████ did not testify at this trial No explanation was offered for his absence This is significant as he may well have been in a position to hear the offending statement, if it was made Wasserman did not interview ██████ personally but reviewed a statement made by ██████ to a previous investigator Wasserman conceded that ██████'s statement helped establish that some measure of force was needed to keep Barnes from interfering with the EMTs trying aid him ██████ also, apparently, differed with Barnes about some of the other allegations she made regarding derogatory comments that she claimed had been made by police officers It would appear that ██████'s statement formed at least part of the basis for the dismissal of some of the allegations made by Barnes

Barnes obviously believed that ██████ had been the victim of a sexual assault by a male relative When asked what happened with the criminal case, Barnes, who initially refused to provide the name of the relative involved, stated that she believed he was convicted and sentenced to probation

The Assistant Department Advocate represented that she could not confirm the disposition of that case because it had been sealed This Court takes note of the fact that the only way criminal convictions are sealed is if the defendant is a youthful or juvenile offender Those offender statuses can only be granted to offenders under the age of 19 It has been stipulated that the age of the alleged sexual assailant was 25 at the time of the incident The only way a criminal case against a person that age can be sealed is if the charges were dismissed or if the offender was allowed to plead guilty to a non-criminal offense such as Disorderly Conduct The representation by the Department that the record

was sealed, coupled with the acknowledged age of the offender, would tend to indicate that there was no criminal conviction and no probation for that charge

Whether Barnes was correct or incorrect about the nature of the sexual act, the statement allegedly made by Respondent would have been inappropriate. The issue before this Court is whether Respondent made that statement, "Just a little fellatio it's no big deal."

Given Barnes' animus toward Respondent and the manner in which [REDACTED]'s statement was practically extracted from him, serious questions arise as to both reliability and substance of their statements. Additionally, the representations made about why [REDACTED] did not give an in-person interview to Wasserman, or more importantly, why he did not testify under oath at this proceeding, did not provide a satisfactory explanation for his absence. Initially, there was a problem because of the lack of a HIPAA release but that problem was resolved before trial. Nonetheless, and in spite of a subpoena served on the hospital by the Department, [REDACTED] did not testify. Further, [REDACTED] apparently indicated to the Assistant Department Advocate that he did not want to testify. Certainly, this must be considered in assessing what weight, if any, to give to unsworn statements made by [REDACTED] in a telephone conversation.

Considering all of these factors, the Department has not met its burden and Respondent is found Not Guilty.

Respectfully submitted,

APPROVED
NOV 15 2011
[Signature]
RAYMOND W. KELLY
POLICE COMMISSIONER

[Signature]
Martin G. Karopkin
Deputy Commissioner - Trials